QUESTIONS PRESENTED

1. Whether claims against petitioners for 271 items improperly presented under the Medicare and Medicaid programs are timely under the limitations period of the Civil Monetary Penalties Law (CMPL), 42 U.S.C. 1320a-7a(c).

2. Whether the civil penalties imposed on petitioners violate the Double Jeopardy Clause of the Fifth Amendment.

3. Whether the civil penalties must be set aside because of the disclosure and use of grand jury materials in the CMPL proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-544

EDWARD J. PETRUS, JR. AND
THE EYE CENTER OF AUSTIN, PETITIONERS

v.

INSPECTOR GENERAL, DEPARTMENT OF
HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals dismissing the appeal of petitioner The Eye Center of Austin (Pet. App. D1-D3) is unreported. The order of the court of appeals affirming the decision of the Secretary (Pet. App. A) is also unreported, but it is noted at 966 F.2d 675 (Table). The final decision of the Departmental Appeals Board (Pet. App. B1-B69) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1992 with respect to petitioner The Eye

Center of Austin, and on June 3, 1992 with respect to petitioner Edward J. Petrus. A petition for rehearing on the court of appeals' decision with respect to petitioner Petrus was denied on July 1, 1992. Pet. App. C. The petition for writ of certiorari was filed on September 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. The Medicare program (Title XVIII of the Social Security Act, 42 U.S.C. 1395-1395ccc) is a federal health insurance program for elderly and disabled persons. Part B, involved here, provides a voluntary subscription program of supplemental medical insurance covering, in general, 80% of the reasonable charges for basic medical services. 42 U.S.C. 1395k, 1395*l*, and 1395x(s). The Medicaid program, created by Title XIX of the Social Security Act, 42 U.S.C. 1396-1396u, is a joint federal-state program designed to provide "medical assistance" to needy individuals whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. 1396. A physician or entity may be barred

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[1] The appendix to the petition (Pet. App. D1-D3) does not reflect the date—May 28, 1992—on which the court of appeals issued its opinion dismissing the appeal of petitioner The Eye Center of Austin. The appendix to the petition (Pet. App. C) likewise omits a line in the court of appeals' order denying rehearing. That line identifies the order as to which rehearing was denied as the one issued on June 3, 1992, and it makes no reference to the court's earlier opinion dismissing the appeal of petitioner Eye Center. As we explain below (p. 8, *infra*,), because no rehearing of the May 28, 1992 order was sought, this Court lacks jurisdiction to entertain the petition insofar as it is advanced on behalf of petitioner Eye Center.

(*i.e.*, suspended or excluded) from participation in the Medicare and Medicaid programs for a variety of reasons, including being convicted of a criminal offense related to the Medicare or Medicaid program. 42 U.S.C. 1320a-7(a)(1); 42 C.F.R. 1001.122 (1991).

The Civil Monetary Penalties Law (CMPL), 42 U.S.C. 1320a-7a *et seq.*, and its implementing regulations, 42 C.F.R. 1003.100 *et seq.* (1991), authorize the Secretary to impose civil monetary penalties, assessments, and/or exclusions against any person or entity who commits one of the enumerated offenses in 42 U.S.C. 1320a-7a(a)(1)(A)-(D). Thus, penalties may be assessed against any person who presents, or causes to be presented, a claim for an item or service under the Medicare or Medicaid program that the person "knows or should know was not provided as claimed." 42 U.S.C. 1320a-7a(a)(1)(A). The CMPL also authorizes such sanctions against a person who presents, or causes to be presented, a claim for an item or service performed by a physician during a period in which he is excluded from participation in the Medicare and Medicaid programs. 42 U.S.C. 1320a-7a(a)(1)(D). The statute further provides that the Secretary may impose a penalty of "not more than $2,000 for each item or service" improperly claimed and "an assessment of not more than twice the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim." 42 U.S.C. 1320a-7a(a).

The Secretary has delegated to the Department's Inspector General the responsibility for implementing the CMPL. 53 Fed. Reg. 12,993 (1988). Whenever the Inspector General decides to seek a penalty

or assessment or an exclusion under the CMPL, he must provide written notice to the person affected, who may then request a hearing before an Administrative Law Judge (ALJ). See 42 U.S.C. 1320a-7a (c)(2); 42 C.F.R. 1003.109 (1991). See also 42 C.F.R. 1003.111 through 1003.125 (1991) (outlining procedures for hearing) Persons adversely affected by the ALJ's determination may seek further review by the Secretary, who has delegated his authority to entertain such appeals to the Department Appeals Board (Board). See 42 C.F.R. 1003.125 (1991); 53 Fed. Reg. 25,543-25,544 (1988). The Board's final decision on behalf of the Secretary may then be appealed to the United States Court of Appeals for the Circuit in which the respondent resides or in which the claim was filed. 42 U.S.C. 1320a-7a(e); 42 C.F.R. 1003.127 (1991).

2. On June 7, 1989, the Inspector General issued a notice of proposed penalties and assessments under the CMPL against petitioner Petrus, an ophthalmologist, and petitioner Eye Center, a corporation wholly owned and operated by Petrus. The proposed penalties and assessments were based on the Inspector General's determination that between June 8, 1983 and February 27, 1984, petitioners submitted claims for 271 items or services performed by Petrus while he was suspended from participation in the Medicare and Medicaid programs, in violation of 42 U.S.C. 1320a-7a(a)(1)(D). That suspension stemmed from Petrus's 1979 conviction for tampering with a government document in the Texas Medicaid Program. In addition, the Inspector General determined that 174 of those 271 items were not provided as claimed, in violation of 42 U.S.C. 1320a-7a(a)(1)(A). Specifically, the Inspector General

concluded that those 174 items listed two other physicians, Dr. Baer and Dr. Malsky, as having performed services that in fact had been performed by Petrus. After a hearing, the Inspector General's liability determinations were upheld by the ALJ, who imposed $100,000 in penalties and $80,000 in assessments on petitioners—substantially less than had been sought by the Inspector General. Pet. App. B6-B10; B31-B32.

The Board affirmed the ALJ's decision in a lengthy opinion. Pet. App. B1-B69. As relevant here, the Board first rejected petitioners' contention that a five-year statute of limitations was applicable to the Inspector General's determination under the CMPL, and that accordingly the Inspector General's June 1989 action—which related to claims submitted by petitioners between June 1983 and February 1984—was time-barred. Pet. App. B12-B20. The Board noted that, as originally enacted, the CMPL contained no statute of limitations, though a five-year period had been adopted by regulation. Pet. B12-B13. On August 18, 1987, however, Congress amended the CMPL, effective September 1, 1987, to provide for a six-year statute of limitations. *Ibid.* (citing Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, §§ 3(b), 15(a), 101 Stat. 687, 698). Relying on the Tenth Circuit's opinion in *Bernstein* v. *Sullivan*, 914 F.2d 1395 (10th Cir. 1990), the Board concluded that the six-year limitations period applies to administrative proceedings initiated after the effective date of the amendments, September 1, 1987. Pet. App. B13-B15. Because the 1989 proceedings against petitioners were commenced within six years of petitioners' sub-

mission of the claims at issue, the Board rejected their statute of limitations defense.[2]

The Board similarly rejected petitioners' contention that the assessments and fines imposed by the ALJ violated the Double Jeopardy Clause of the Fifth Amendment (as construed in *United States* v. *Halper*, 490 U.S. 435 (1989)), in light of petitioner Petrus's 1985 Medicaid-related conviction. Pet. App. B47-B49.[3] The Board observed that no double jeopardy claim could be raised as to the vast majority of the 271 items at issue because only six of those items had been the subject to Petrus's 1985 criminal prosecution. *Id.* at B48. The proportionate amount of the total penalties and assessments attributable to those six items (6/271 of $180,000) was less than $4,000. The Board concluded that that amount bore a "reasonable relationship" to the government's loss of approximately $1,425. *Id.* at B48-B49. Accordingly, the Board held that those penalties and assessments were not improper under *Halper*. *Ibid.*

Finally, the Board rejected petitioners' claim that the Inspector General's use of grand jury materials

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[2] The Board also rejected petitioners' related contention that the docketing of the case before the ALJ was necessary to commence the action, noting that the CMPL expressly provides that actions thereunder may be "initiat[ed]" by "serving notice of the action," as the Inspector General did here. Pet. App. B18-B20 (citing 42 U.S.C. 1320a-7a(c)(1)).

[3] Based on claims submitted following the suspension of Petrus from the Medicare and Medicaid programs in May 1983, a federal grand jury began investigating his billing practices for those programs. Petrus eventually pleaded guilty to two counts of submitting false reimbursement claims involving six items or services, and to one count of obstructing justice. See Gov't C.A. Br. 8; Pet. App. B7.

pertaining to Petrus's criminal conviction violated Fed. R. Crim. P. 6(e)(3)(C)(i). Pet. App. B20-B24. Those materials had been obtained pursuant to a court order secured by the Inspector General (through an Assistant United States Attorney). *Id.* at B22. The Board noted that the district court that issued the order could reasonably have determined that use of the grand jury materials in the administrative hearing satisfied the Rule's provision authorizing disclosure "preliminarily to or in connection with a judicial proceeding." *Id.* at B23 (quoting Fed. R. Crim. P. 6(e)(3)(C)(i)). In any event, the Board noted that "the witnesses whose testimony was released were all present at the ALJ hearing and subject to confrontation and cross-examination." Pet. App. B23. The Board therefore concluded that "even if the grand jury materials were stricken from the record," it would nonetheless uphold the ALJ's decision because those materials were cited in connection with "relatively few" of the 271 items and were "for the most part * * * simply cumulative of other evidence in the record supporting the findings." Pet. App. B23, B24.

3. Petitioner Petrus sought review of the Board's decision in the United States Court of Appeals for the Fifth Circuit on behalf of himself and of petitioner Eye Center. On November 12, 1991, the court of appeals issued an order directing petitioners' attention to circuit precedent precluding a corporation from prosecuting an appeal without a licensed attorney. Pet. App. D2. Petitioners responded to that order by contending that Petrus was authorized to represent the Eye Center under state law. *Ibid.* Because the Eye Center failed to obtain licensed counsel, the court of appeals dismissed its appeal on

May 28, 1992. Pet. App. D1-D3. On June 3, 1992, the court of appeals summarily affirmed the Board's decision as to petitioner Petrus. Pet. App. A.

ARGUMENT

Petitioners renew their contentions relating to the applicable statute of limitations, the Double Jeopardy Clause of the Fifth Amendment, and the propriety of the Inspector General's use of grand jury materials. The decision of the Fifth Circuit rejecting those claims is correct, however, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. At the outset, the Court lacks jurisdiction to entertain petitioner Eye Center's claims because the petition was filed more than ninety days after the court of appeals' judgment dismissing its appeal. That judgment was entered on May 28, 1992. The court of appeals treated a subsequent petition for rehearing that challenged only the June 3, 1992 affirmance of the Board's decision—and not the prior dismissal of the Eye Center's appeal because of its failure to obtain counsel—as having been filed on behalf of petitioner Petrus alone. The petition for a writ of certiorari was filed on September 28, 1992, which was 123 days after the judgment became final as to petitioner Eye Center. Accordingly, the Court lacks jurisdiction to entertain the claims raised in the petition insofar as they are advanced on behalf of the Eye Center. See 28 U.S.C. 2101(c); *Department of Banking* v. *Pink*, 317 U.S. 264, 266-268 (1942).

2. In any event, the claims advanced in the petition do not merit review. Petitioners first contend (Pet. 6-11) that the Inspector General's action seek-

ing penalties and assessments was barred by a five-year statute of limitations. Petitioners concede that Section 3(b) of the Medicare and Medicaid Patient and Program Protection Act of 1987 (MMPPPA), Pub. L. No. 100-93, 101 Stat. 687, enacted a six-year statute of limitations for CMPL actions. Pet. 6-7. They contend, however, that the effective date of that statute of limitations is governed by Section 15(d) of the MMPPPA, which they interpret as applying the new limitations period only to claims submitted by a medical provider after September 1, 1987. Petitioners are mistaken. Section 15(d) of the MMPPPA by its terms is addressed solely to the amendments to the CMPL effected by Section 3(a)(1) of the MMPPPA (which relate solely to the type of conduct that may properly result in a provider's liability under the CMPL, see 101 Stat. 686-687), not to the statute of limitations enacted by Section *3(b)*. The effective date of Section 3(b) is governed by Section 15(a), which provides that the MMPPPA applies to "administrative proceedings commenced" after September 1, 1987. Because the Inspector General indisputably commenced the administrative proceedings against petitioners after that date, the court of appeals correctly concluded that the Inspector General's action was not time-barred.[4]

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[4] The court of appeals' affirmance of the Board's ruling that Section 15(a) governs the effective date of the statute of limitations enacted by Section 3(b) of the MMPPPA is in agreement with the decision of the only other court of appeals to consider the question. See *Bernstein* v. *Sullivan*, 914 F.2d 1395, 1398-1400 (10th Cir. 1990). Petitioners attempt to distinguish *Bernstein* (Pet. 9) on the ground that Dr. Bernstein did not provide any services at all, whereas petitioners provided services under false pretenses. The specific grounds on

There is no force to petitioners' claim (Pet. 6, 11) that the decision of the court of appeals conflicts with this Court's decision in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988). In *Bowen*, the Court held that the Secretary may not promulgate retroactive rules setting the levels of cost reimbursements under the Medicare Act. *Id.* at 209-215. That decision was based on the conclusion that Congress did not authorize the retroactive rule at issue. The Court in *Bowen* reaffirmed, however, the well-settled principle that enactments of Congress will be given retroactive effect when "their language requires this result." *Id.* at 208. Because the six-year period applied to petitioners was required by the plain language of the MMPPA, and not by an agency rule, *Georgetown University Hospital*, far from conflicting with the decision of the court of appeals, strongly supports it.

3. Petitioners next contend (Pet. 11-13) that the penalties and assessments imposed against them are improper under this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989). That contention, too, is meritless. *Halper* held that the imposition of

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which liability was predicated in *Bernstein*, however, are irrelevant to the court's analysis of the statute of limitations issue. Equally unavailing is petitioners' attempt to distinguish *Bernstein* on the ground (Pet. 9-10) that Dr. Bernstein and the Inspector General had agreed to toll the statute of limitations as to some claims. That agreement, too, was irrelevant to the court of appeals' analysis of the statute of limitations issue, because many claims were already beyond the five-year limitations period when the agreement was executed and, as to the other claims, the proceedings were commenced after expiration of the tolling agreement and more than five years after accrual. *Bernstein*, 914 F.2d at 1398-1399.

civil penalties for conduct that was previously the subject of a criminal conviction may violate the Double Jeopardy Clause of the Fifth Amendment in "the rare case" where it subjects "a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. The Court made clear, however, that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446; *id.* at 452-453 (Kennedy, J., concurring). Here, neither petitioner was ever criminally prosecuted for 265 of the 271 items at issue, and thus no double jeopardy could possibly arise as to those items. *Id.* at 450. While Petrus had previously been convicted in connection with the remaining six items, the amount of penalties and assessments attributable to those few claims (approximately $4,000) bears a manifestly reasonable relationship to the government's damage in overpayments (approximately $1,400) and related costs of investigation, and is therefore not punitive under this Court's analysis in *Halper*.[5]

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[5] To the extent petitioners contend that *Halper* requires an accounting or precise proof of the government's damages (Pet. 12-13), they are once again mistaken. *Halper* teaches that no actual proof of damages is necessary unless and until the penalties imposed are overwhelmingly disproportionate to any estimated loss. *United States* v. *Halper*, 490 U.S. at 449.

Nor is there force to petitioners' claim (Pet. 12) that the Fifth Circuit's earlier decision in *United States* v. *Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991), cert. denied, 113

4. Finally, petitioners renew their argument (Pet. 13-16) that disclosure to the Inspector General of materials gathered by the grand jury that investigated and indicted Petrus was improper under Fed. R. Crim. P. 6(e). Petitioners concede, as they must (Pet. 14-15), that Rule 6(e)(3)(C)(i) expressly authorizes disclosure of matters occurring before the grand jury "preliminarily to or in connection with a judicial proceeding." They contend, however, that a hearing before an ALJ to adjudicate penalties and assessments pursuant to the CMPL does not meet that test under this Court's decision in *United States* v. *Baggot*, 463 U.S. 476 (1983). That contention does not warrant review.

First, *Baggot* held that disclosure of grand jury materials for use solely in a purely investigative IRS audit of civil tax liability is not authorized by Rule 6(e)(3)(C)(i), but expressly declined to pass on the permissibility of such disclosure in connection with other administrative schemes, especially where they require resort to courts. *United States* v. *Baggot*, 463 U.S. at 482. The ALJ hearing prescribed under the CMPL scheme is an adjudicative, not investigatory, proceeding, and it is subject to judicial review. The hearing therefore differs significantly from the internal audit at issue in *Baggot*. Second, the Board found—and petitioners do not dispute—that the

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S. Ct. 123 (1992), is inconsistent with its decision in this case. In *Sanchez-Escareno*, the court held that a criminal defendant's execution of promissory notes for civil forfeiture fines prior to the criminal proceeding does not constitute multiple punishments for purposes of double jeopardy. 950 F.2d at 201-202. Because the government had not actually collected on the notes, there was no "second" sanction that could be characterized as punitive. *Ibid.*

grand jury materials used by the Inspector General here were duplicative of the overwhelming testimonial and documentary evidence introduced at the hearing, and thus their allegedly improper disclosure did not prejudice petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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